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MATERIALS ON PROPERTY

Part I

D. Mendes da Costa
Faculty of Law
University of Toronto

1978/79 EDITION

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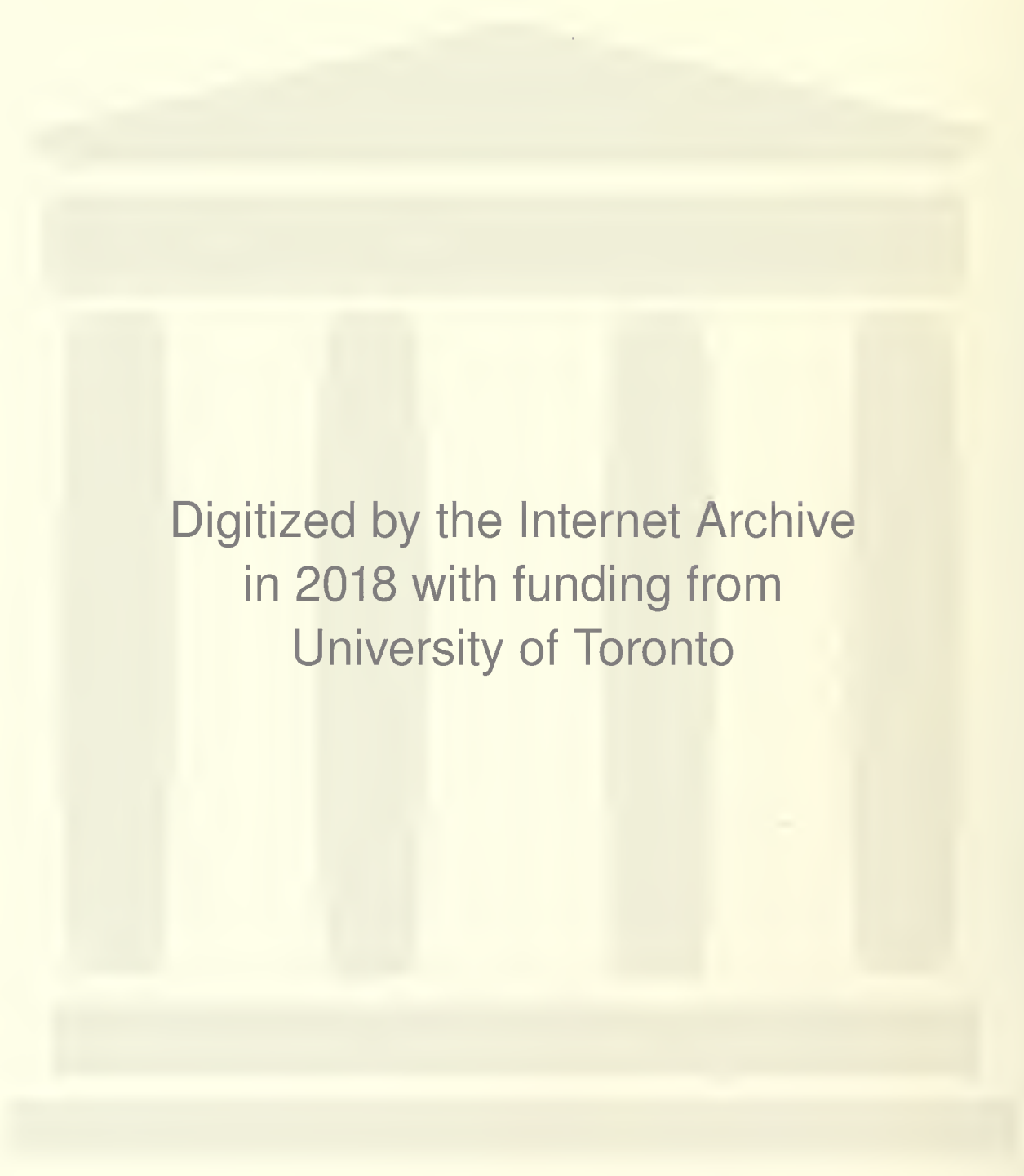
PART I

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C O N T E N T S - P A R T 1

PERSONAL PROPERTY

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PREFACE

These materials are prepared for teaching purposes only. They are provided only for the purpose of discussion in class. They are to be used for no other purpose. The aim of these materials is to introduce the student to some general principles relating to the Law of Real and Personal Property. Volume 1 deals with some aspects of the Law of Personal Property. Volumes 2 to 5 are concerned with some aspects of the Law of Real Property and also with Leaseholds.

This material does not purport to be comprehensive or exhaustive. Further, it is compiled on the assumption that other topics, including, for example, land use planning, land finance, land development, real estate transactions, community planning, environmental control, and expropriation ~~are~~ dealt with later in the curriculum. These topics are not included within the scope of this Casebook.

CHAPTER 1

SECTION 1 INTRODUCTIONPROBLEM

John is a science enthusiast. In 1965 John purchased the fee simple estate in Blackacre and the fee simple estate in Whiteacre. Blackacre comprises 30 acres of pasture land situate in a valley. Whiteacre comprises 20 acres of mountainous land, and borders the western extremity of Blackacre. John decided that he would produce novel sound-waves by "bouncing" a signal off the eastern face of Whiteacre, from a transmitter situated on Blackacre. To produce the sound-waves intended by John, it was necessary to determine the precise location at which to place the transmitter on Blackacre and also the precise place on Whiteacre at which to "aim" the signal. This endeavour involved a very substantial expenditure of money in the purchase of necessary equipment, and of effort in repeated experiments. In January, 1974, as a result of constant and diligent exertion, John produced the long sought after sound-waves.

The fee simple estate in Greenacre is owned by Jim. Jim has erected on Greenacre an apparatus that enables him to reproduce, on Greenacre, the sound-waves produced by John. Jim has amplified these sound-waves and charges an admission fee to members of the public to enter upon Greenacre and attend "Sound-Waves of the Future" concerts. John has requested Jim to cease reproducing the sound-waves produced by John. Jim has refused and is continuing to hold "Sound-Waves of the Future" concerts.

Sections 2(c), 21(e), and 29(a) of the Novel Sound-Waves Act provide:

- 2(c): No person shall produce novel sound-waves without first obtaining a licence therefore, in accordance with the provisions of section 4 of this Act, from the Novel Sound-Waves Licencing Board.
- 21(e): **For the purposes of this Act, any person who produces novel sound-waves without first obtaining a licence in accordance with the provisions of section 2(c) of this Act, shall have no property right or interest whatsoever in such sound-waves.**
- 29(a): Any person who contravenes any of the provisions of section 2 of this Act, is guilty of an offence and on summary conviction is liable to a fine of not more than \$5,000.
- 29(b): Any transmitter or other equipment used in the production of novel sound-waves in contravention of any of the provisions of Section 2 of this Act, may be seized and a court of competent jurisdiction may order the destruction or other disposition of any such equipment.

John has not obtained the necessary licence.

Advise John and Jim.

On occasion a question may arise as to property ownership. In the formulation of the controlling rule of law - or indeed of any rule of law - what factors should influence a court?

TUCKER v. FARM AND GENERAL INVESTMENT
TRUST LTD.
[1966] 2 Q.B. 421 (C.A.)

LORD DENNING M.R. In August, 1963, Mervin James Perry, who was a farmer at Hockworthy, near Wellington, Somerset, acquired a number of ewes, 84 Kerry Hill cross ewes, on hire-purchase. The finance company was the Farm & General Investment Trust Ltd., the defendants. Mr. Perry paid £120 down. The total hire-purchase price was £647. It is significant that having made the initial payment of £120, there were only two instalments payable many months later. The first instalment was payable 10 months thereafter on June 20, 1964, the sum of £263 10s. The next one on August 28, 1964, of another sum of £263 10s. The reason, no doubt, was to give time for the ewes to have lambs. Then, as is usual under a hire-purchase agreement, at the end of the hiring, if the hirer had paid those instalments, by paying an extra £1 as the option to purchase, he could buy the ewes. It is quite a simple straightforward hire-purchase agreement for livestock.

In September Perry had those ewes served. They had their lambs at the end of February and the beginning of March. Then on April 2, Perry, apparently being in financial difficulties, sold the ewes and the lambs—I think 75 ewes and 83 lambs—to the plaintiff, also a farmer. Mr. Perry had no right whatever to sell the ewes as they were the property of the defendants. But the plaintiff did not know this. He bought the ewes and lambs in good faith. He had not got room for the ewes and lambs on his farm, so he asked Perry to keep them for a bit. Mr. Perry a week later sold them again. He had no right to do so. He sold them to one Punchard, who took them off. But Punchard soon found that there was something wrong about the deal and he called it off. He stopped his cheque. The defendants got to know about it. The defendants on April 22 said: “These ewes and lambs are ours,” and they took possession of the ewes and lambs. So the plaintiff, who, as I have said, on April 2 had bought the ewes and lambs and paid for them, found himself without any. He had to admit that the ewes belonged to the defendants, but he said that the lambs were his. He said they belonged to Perry at the time when Perry sold them to him; and Perry had a right to sell the lambs and so the lambs were his.

The county court judge did not accede the plaintiff's claim. He said there was a principle of English law that when a person owns livestock, the progeny always belongs to the owner. The property in the young of domestic animals is the owner of the mother. It says so in Halsbury's Laws of England, 3rd ed., Vol. 1 (1952), p. 656. The judge said that, as in this case the defendants were the owners of the ewes when the lambs were born, they were the owners of the lambs too and were the owners of them on April 2 and indeed all the time. There was no implication in the contract, said the judge, that they should belong to Perry.

We have had the benefit before us of many more authorities than the judge had, and I think I must say that the principle stated in Halsbury is far too wide. It is based on Sir William Blackstone (2 Bl.Com. 390), but if you go back to Blackstone you will see that Blackstone is only considering a case where the male is owned by one person and the female by another. He is not dealing with lessor or lessee at all. Blackstone says¹:

“Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that ‘partus sequitur ventrem’ in the brute creation, though for the most part in the human species it disallows that maxim. And therefore in the laws of England, as well as

Rome"—then I will translate the Latin into English—"if your stallion makes my mare become pregnant, then the foal belongs not to you but to me who am the owner of the mare."
 "And, for this Puffendorf gives a sensible reason: not only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with greater expense and care: wherefore as her owner is the loser by her pregnancy, he ought to be the gainer by her brood."

He goes on to give the exception of swans which was mentioned by Lord Coke as long ago as 1594 in the *Case of Swans*² in the Abbotsbury Swannery. Blackstone says³:

"An exception to this rule is in the case of young cygnets; which belong equally to the owner of the cock and hen, and shall be divided between them. But here the reasons of the general rule cease, and 'cessante ratione cessat et ipsa lex'; for the male is well known, by his constant association with the female; and for the same reason the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other."

Swans, as we all know, are faithful unto death and beyond. If the owner of the cock is different from the owner of the hen, they share the cygnets between them.

Turning to cases between lessor and lessee, we have been referred to passages in the Roman law from Justinian and the Digest. Also to a helpful case in the Cape Province Supreme Court of *Morkel v. Malan*.⁴ It is clear that in Roman law, and in Roman-Dutch law, the usufructuary—that is, the person who is entitled to the enjoyment of the use of the animal—becomes entitled not only to the *jus utendi*, the right of using it, but also to the *jus fruendi*, the right of having the fruit or progeny of it. I would be quite prepared, if there was no English authority, to follow that rule of the civil law and apply it to lessor and lessee.

But Mr. Owen has very properly referred us to an English authority which makes it unnecessary for us to go back into the Roman law. It was decided as long ago as 1586, the case of *Wood v. Ash and Foster*.⁵ A lessor had let land for 20 years with a stock of sheep. The question arose whether the young of the sheep belonged to the lessor or to the lessee. It was argued there by Walmesley of counsel.⁶

"Although the first stock was changed, yet the new stock does supply it, and is in place thereof, and shall be in the same condition as the other stock is, and therefore the lessor shall have property in it."

Then the reporter goes on to give the decision⁶:

"But the whole court was against him: for they said that the increase of the stock of sheep should be to the lessee, and the lessor shall never have them at the end of the term: but they agreed, that if the lease were of the stock with lambs, calves, and piggs"—that is to say, if the lease expressly provided that it was a lease of the stock together with any lambs, calves and piglets that might be born—"there the increase belongs to the lessor." The court went on to make a distinction between dead stock and live stock: "And all the court took this difference, sc. when a lease is made of dead goods, and when of living; for when the lease is of dead goods, and any thing is added to them for reparations or otherwise, the lessor shall have this addition at the end of the terme, because it belongs to the principle: " that is, it is added to the principal thing that is leased, "but in case of a stock of cattle, which hath an increase, as calves and lambs, there these things are severed from the principle,"—that is, are severed from the principal animals—"and lessor shall never have them, for then," that is, were it otherwise, "the lessor shall"—would—"have the rent, and the lessee shall"—would—"have no profit."

In other words, if the progeny did not belong to the lessee, it would mean that the lessor would have the rent and the lessee would have no profit—which would be absurd.

That seems to me to be a direct authority, now standing for nearly 400 years, which shows that in the case of a lease of live-stock, then, if during the course of the lease the livestock has progeny, that progeny belongs to the lessee. If the lessor desires to claim them and to retain the property in them, he must expressly stipulate for it in the lease by saying the lease of the livestock together with the progeny that may thereafter be born.

Mr. Owen recognised the force of that authority, but he sought to distinguish this case, saying that a hire-purchase agreement was different from a lease. I see no distinction whatever between a lease and a hire-purchase agreement; because after all a hire-purchase agreement is a lease. It is a hiring in point of law, simply with an option to purchase added. I hold that on this hire-purchase agreement, nothing being said about progeny, any progeny that arose during the hiring belonged to the hirer.

The parties must have intended this in this very agreement, for why otherwise was it necessary to put off the instalments for 10 months, the first one being on June 28, 1964? The reason no doubt was that the sheep would be served and have their lambs in February or March. The lambs would be ready for sale, separate from their mothers, at the end of May or the beginning of June. Then the farmer, on selling the lambs, could pay the instalments which were then to become due in June or August. The whole of this agreement coincides with the law as I have stated it.

We were told that nowadays there are many more hire-purchase agreements of livestock than there were. The defendants issue advertisements to induce farmers to take cows on hire-purchase, saying: "Pay as you milk." That is obviously on the basis that, when the farmer milks the cows, the milk becomes his, so that he can sell it and with the proceeds pay the instalments. So with sheep. It is: "Pay as you sell the lambs." The farmer was to have the lambs. They were to be his to sell so that he could pay the instalments with the proceeds. The same when he comes to shear and has the wool from the fleeces. He can sell the wool. The law on this matter coincides with what must have been the intention of the parties. The lambs which are bred by the hirer during the currency of the agreement belong to the hirer.

So they were Perry's lambs when he sold them on April 2 to the plaintiff. He could give a good title to the plaintiff, as he did. The plaintiff has a good action in conversion against the defendants when they took them on April 22 wrongly. The value of the lambs is now agreed to be £207 10s.

I would, therefore, allow the appeal and order judgment to be entered for the plaintiff for the sum of £207 10s.

Harman and Diplock L.JJ. also delivered judgments allowing the appeal.

See also: West v. Ankney, 134 N.E. 2d 185 (1956) (Ohio Com. Pl.), and Wickahoney Sheep Co. v. Sewell, 273 F. 2d 767 (1959) (C.A. of Ohio).

The general rule seems to be that the offspring of an animal belong to the owner of the mother. What factors support this rule? What other possible results could be formulated?

PROBLEM

In 1968, John, without the knowledge or consent of Tom, entered Tom's land and drove away part of a flock of sheep belonging to Tom. In 1969, some of the ewes gave birth to lambs. In 1970, Tom for the first time discovered his loss. To whom do the lambs belong? Advise John and Tom.

THE HUMAN TISSUE GIFT ACT
S.O. 1971 c. 83

1. In this Act,

- (a) "consent" means a consent given under this Act;
- (b) "physician" means a person registered under *The Medical Act*;
- (c) "tissue" includes an organ, but does not include any skin, bone, blood, blood constituent or other tissue that is replaceable by natural processes of repair;
- (d) "transplant" as a noun means the removal of tissue from a human body, whether living or dead, and its implantation in a living human body, and in its other forms it has corresponding meanings;
- (e) "writing" for the purposes of Part II includes a will and any other testamentary instrument whether or not probate has been applied for or granted and whether or not the will or other testamentary instrument is valid.

PART I

INTER VIVOS GIFTS FOR TRANSPLANTS

2. A transplant from one living human body to another living human body may be done in accordance with this Act, but not otherwise.

3.—(1) Any person who has attained the age of majority, is mentally competent to consent, and is able to make a free and informed decision may in a writing signed by him consent to the removal forthwith from his body of the tissue specified in the consent and its implantation in the body of another living person.

(2) Notwithstanding subsection 1, a consent given thereunder by a person who had not attained the age of majority, was not mentally competent to consent, or was not able to make a free and informed decision is valid for the purpose of this Act if the person who acted upon it had no reason to believe that the person who gave it had not attained the age of majority, was not mentally competent to consent, and was not able to make a free and informed decision, as the case may be.

(3) A consent given under this section is full authority for any physician,

- (a) to make any examination necessary to assure medical acceptability of the tissue specified therein; and
- (b) to remove forthwith such tissue from the body of the person who gave the consent.

(4) If for any reason the tissue specified in the consent is not removed in the circumstances to which the consent relates, the consent is void.

PART II

POST MORTEM GIFTS FOR TRANSPLANTS
AND OTHER USES

4.—(1) Any person who has attained the age of majority may consent,

- (a) in a writing signed by him at any time; or
- (b) orally in the presence of at least two witnesses during his last illness,

that his body or the part or parts thereof specified in the consent be used after his death for therapeutic purposes, medical education or scientific research.

(2) Notwithstanding subsection 1, a consent given by a person who had not attained the age of majority is valid for the purposes of this Act if the person who acted upon it had no reason to believe that the person who gave it had not attained the age of majority.

(3) Upon the death of a person who has given a consent under this section, the consent is binding and is full authority for the use of the body or the removal and use of the specified part or parts for the purpose specified, except that no person shall act upon a consent given under this section if he has reason to believe that it was subsequently withdrawn.

5. (1) Where a person of any age who has not given a consent under section 4 dies, or in the opinion of a physician is incapable of giving a consent by reason of injury or disease and his death is imminent,

- (a) his spouse of any age; or
- (b) if none or if his spouse is not readily available, any one of his children who has attained the age of majority; or
- (c) if none or if none is readily available, either of his parents; or
- (d) if none or if neither is readily available, any one of his brothers or sisters who has attained the age of majority; or
- (e) if none or if none is readily available, any other of his next of kin who has attained the age of majority; or
- (f) if none or if none is readily available, the person lawfully in possession of the body other than, where he died in hospital, the administrative head of the hospital,

may consent,

- (g) in a writing signed by the spouse, relative or other person; or
- (h) orally by the spouse, relative or other person in the presence of at least two witnesses; or
- (i) by the telegraphic, recorded telephonic, or other recorded message of the spouse, relative or other person,

to the body or the part or parts thereof specified in the consent being used after death for therapeutic purposes, medical education or scientific research.

(2) No person shall give a consent under this section if he has reason to believe that the person who died or whose death is imminent would have objected thereto.

(3) Upon the death of a person in respect of whom a consent was given under this section the consent is binding and is, subject to section 6, full authority for the use of the body or for the removal and use of the specified part or parts for the purpose specified except that no person shall act on a consent given under this section if he has actual knowledge of an objection thereto by the person in respect of whom the consent was given or by a person of the same or closer relationship to the person in respect of whom the consent was given than the person who gave the consent.

(4) In subsection 1, "person lawfully in possession of the body" does not include,

- (a) the supervising coroner or a coroner in possession of the body for the purposes of *The Coroners Act*;
- (b) the Public Trustee in possession of the body for the purpose of its burial under *The Crown Administration of Estates Act*;
- (c) an embalmer or funeral director in possession of the body for the purpose of its burial, cremation or other disposition; or
- (d) the superintendent of a crematorium in possession of the body for the purpose of its cremation.

6. Where in the opinion of a physician, the death of a person is imminent by reason of injury or disease and the physician has reason to believe that section 7, 21 or 22 of *The Coroners Act* may apply when death does occur and a consent under this Part has been obtained for a post mortem transplant of tissue from the body, a coroner having jurisdiction, notwithstanding that death has not yet occurred, may give such directions as he thinks proper respecting the removal of such tissue after the death of the person, and every such direction has the same force and effect as if it had been made after death under section 8 of *The Coroners Act*.

7.—(1) For the purposes of a post-mortem transplant, the fact of death shall be determined by at least two physicians in accordance with accepted medical practice.

(2) No physician who has had any association with the proposed recipient that might influence his judgment shall take any part in the determination of the fact of death of the donor.

(3) No physician who took any part in the determination of the fact of death of the donor shall participate in any way in the transplant procedures.

(4) Nothing in this section in any way affects a physician in the removal of eyes for cornea transplants.

8. Where a gift under this Part cannot for any reason be used for any of the purposes specified in the consent, the subject-matter of the gift and the body to which it belongs shall be dealt with and disposed of as if no consent had been given.

PART III

GENERAL

9. No action or other proceeding for damages lies against any person for any act done in good faith and without negligence in the exercise or intended exercise of any authority conferred by this Act.

10. No person shall buy, sell or otherwise deal in, directly or indirectly, for a valuable consideration, any tissue for a transplant, or any body or part or parts thereof other than blood or a blood constituent, for therapeutic purposes, medical education or scientific research, and any such dealing is invalid as being contrary to public policy.

11. - (1) Except where legally required, no person shall disclose or give to any other person any information or document whereby the identity of any person,

(a) who has given or refused to give a consent;

(b) with respect to whom a consent has been given; or

(c) into whose body tissue has been, is being or may be transplanted,

may become known publicly.

(2) Where the information or document disclosed or given pertains only to the person who disclosed or gave the information or document, subsection 1 does not apply.

12. Any dealing with a body or part or parts thereof that was lawful before this Act came into force shall, except as provided in this Act, continue to be lawful.

13. Every person who knowingly contravenes any provision of this Act is guilty of an offence and on summary conviction is liable to a fine of not more than \$1,000 or to imprisonment for a term of not more than six months, or to both.

14. Except as provided in section 6, nothing in this Act affects the operation of *The Coroners Act*.

15. A request made or an authorization given under *The Human Tissue Act, 1962-63* before this Act came into force may be acted upon in accordance with that Act notwithstanding the repeal of that Act.

PART IV

MISCELLANEOUS

16. *The Human Tissue Act, 1962-63* and *The Human Tissue Amendment Act, 1967* are repealed.

17. This Act comes into force on the day it receives Royal Assent.

18. This Act may be cited as *The Human Tissue Gift Act, 1971*.

Assented to July 28th, 1971

See: Sugiyama, Inter Vivos Transplantations and the Human Tissue Gift Act, S.O. 1971, c. 83, (1976), 34 U. of T. Fac. L. Rev. 124.

EDMONDS v. ARMSTRONG FUNERAL HOME Ltd.
 [1931] 1 D.L.R. 676 (Alta. S.C., App. Div.)

The judgment of the Court was delivered by

HARVEY, C.J.A.:—This is an appeal from the order of Walsh, J., [1930] 4 D.L.R. 901, dismissing the plaintiff's action on the ground that the statement of claim disclosed no cause of action.

The statement of claim alleges that the defendant Stewart is a physician and surgeon and continues:—“(4) On or about July 21, 1930, following the death of the plaintiff's wife, I. Edmonds, the plaintiff engaged the services of the defendant, Armstrong Funeral Home Ltd., to make all preparations and arrangements necessary for the burial of the body of his deceased wife, and on or about the said date the corpse was placed in the funeral home of the said defendant.

“(5) On or about July 22, 1930, the defendant, Armstrong Funeral Home Ltd., did unlawfully allow the defendant, J. D. Stewart to enter its premises and without the consent of the plaintiff to perform an autopsy on the body of the deceased I. Edmonds.

“(6) The defendant, J. D. Stewart, on or about July 22, 1930, with the consent of the defendant, Armstrong Funeral Home Ltd., did perform an autopsy on the body of the plaintiff's deceased wife, without the consent of the plaintiff, after the plaintiff had refused the defendant Stewart permission to perform said autopsy.

“(7) In making said autopsy the defendant Stewart did make an incision in the body of the deceased and did remove therefrom a portion of the anatomy of the said corpse.

“(8) The defendant Stewart by his unlawful acts in mutilating said body and removing portions therefrom did cause the plaintiff mental anguish and suffering and the plaintiff has suffered damages thereby.

“The plaintiff therefore claims:—(a) General damages in the sum of \$5,000 against the defendants and each of them; (b) the costs of this action; (c) such other and further relief as to this Honourable Court may seem just.”

The learned Judge, [1930] 4 D.L.R., at p. 902, was of opinion that the decision of this Court in *Miner v. C.P.R.* (1910), 3 Alta. L.R. 408, was to the effect “that damages for mental suffering are not recoverable in such an action as this and that being so this action, which is solely for the recovery of damages for which the defendants cannot be held liable, cannot be maintained.”

In the *Miner* case the defendant company's employees, by a quite excusable and, of course, quite unintentional mistake in reading the word “Bawlf” as “Banff” had put a corpse off at a wrong station, which resulted in a delay of the funeral for one day and a disturbance of the arrangements and of the feelings of the plaintiff, the mother of the deceased.

The trial Judge gave her damages for her mental suffering, but on appeal his judgment was reversed.

It is to be noted that that action so far as it was one in tort was one based on negligence and is, therefore, not such an action as this, which is based on the alleged wilful and wrongful acts of the defendants and the authorities upon which the decision rests relate to actions arising out of negligent acts, and on p. 422, it is stated, that a consideration of mental anguish as an element of damage “is never sanctioned by the English Courts except in cases where the defendant has been guilty of wilful misconduct, for which reason the damages are aptly termed exemplary, or vindictive.” On p. 420 it is pointed out in a quotation from 10 Hals., para. 566, that damages for wounded feelings are “‘awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrongdoer.’” They are, of course, quite properly taken into consideration in such actions for tort as assault, trespass, defamation, seduction, malicious prosecution and false imprisonment.

It is clear, therefore, that the *Miner* case, being one for negligence, is not such a one as this and that it does not intend to decide that damages may not be recovered for mental anguish in such a case as the present.

It is, however, equally clear that mental suffering or other loss caused by a defendant will not support an action in the absence of some *injuria* to the person damnified.

Section 237 of the Cr. Code provides that:—"Every one is guilty of an indictable offence and liable to five years' imprisonment who . . . (b) improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not." But even though the act complained of may be within the section and subject the defendant to the punishment prescribed, it does not by reason of that fact furnish a ground of liability to a civil action by the plaintiff or anyone else.

However, in Clerk & Lindsell on Torts, 8th ed., p. 239, it is stated:—"In the dead body of a human being there is no property, but the executors or administrators of the deceased or other persons charged by the law with the duty of interring the body have a right to the custody and possession of it until it is properly buried. Any violation of that right to possession, such as an unauthorized post-mortem examination, is a trespass for which an action lies."

The authority for this proposition is two Scottish cases, which are not available for examination and Mr. Sinclair suggests that the Scottish law in this respect may differ from the English. There is, however, no suggestion in the text that it is other than a statement of English law.

In 3 Hals., p. 405, para. 851, it is stated:—"The law as to the persons upon whom the duty of disposing of a dead body falls, and as to the nature of that duty, is imperfectly developed. Such a duty is, however, recognised as incumbent on the executors of the deceased, on the husband of a deceased wife, on the parent of a deceased child, and on any householder on whose premises the body lies; and neglect of the duty may be a common law misdemeanour."

By s. 237 of the Code already referred to, it is proved that:—"Every one is guilty of an indictable offence and liable to five years' imprisonment who, (a) without lawful excuse, neglects to perform any duty either imposed upon him by law or undertaken by him with reference to the burial of any dead human . . . remains."

If, therefore, there was a duty on the plaintiff to bury his deceased wife, as stated by Halsbury, and as stated by Farwell, L.J., in *Clark v. London Gen'l Omnibus Co.*, [1906] 2 K.B. 648, at p. 663, or even if there was no such duty imposed by law, yet having undertaken the duty as the allegations state the plaintiff did, then his failure to perform that duty would subject him to the penalty of s. 237 of the Code.

It must follow, of course, that to that duty is incident the legal right to whatever is essential to the performance of the duty and 3 Hals., pp. 405-6, para. 852, states that:—"The law, in general, recognises no property in a dead body; but it does recognise as incident to the duty to dispose of the body rights to the possession of the body until it is disposed of." And in 17 Corp. Jur., p. 1138, we find it stated that:—"The right of sepulture is not an absolute one, but must yield when in conflict with the public good or when the demands of justice require such subordination. Therefore no matter in whom the right of burial rests, it is in the nature of a sacred trust for the benefit of all who may, from family ties or friendship, have an interest in the remains." Further at p. 1139:—"Upon the death of a married person, the surviving spouse has the paramount right as to the custody of the remains of the deceased and its burial."

As pointed out these rights are subordinate to the demands of justice or public good and the English law has known for centuries a public official called a coroner charged with the duty of looking after the needs of justice and with the authority in proper cases to interfere with the private rights of individuals.

How careful the law has always been of the natural sentiments respecting dead relatives is exemplified in the Anatomy Act, 1832 (Imp.), c. 75, which authorizes a person having the lawful possession of a corpse to permit an anatomical examination under certain conditions but even then or even if the deceased has himself before death authorized such examination it may not be had against the wish of the surviving husband or wife or relatives.

If then, as seems clearly established, the plaintiff had the right to the custody and control of the remains of his deceased wife any unauthorized interference with that right, such as is alleged, was an invasion of his right and would give a cause of action.

In *Embrey v. Owen*, 6 Exch. 353, 155 E.R. 579, Parke, B., delivering the judgment of the Court, said (p. 368):—"Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage; injuria sine damno is actionable, as was laid down in the case of *Ashby v. White* (2 Ld. Raym. 938 [92 E.R. 126]) by Lord Holt, and in many subsequent cases."

The plaintiff has alleged an unlawful mutilation of the body and the removal of certain parts, by the defendant Stewart, permitted by his co-defendant by reason of which he has suffered damages, which acts constituted a violation of the plaintiff's right of custody and control and would consequently give a right of action and from these acts damage will be presumed. It is alleged that in addition to the damage to be presumed he has suffered mental anguish and suffering.

If the plaintiff had contented himself with saying that he had suffered damage from the defendants' acts without more it would seem on the authorities quoted to have been sufficient for his case and the addition of the words "mental anguish and suffering" cannot affect his right of action and if the suffering can be considered as an element of the damage then there would appear to be no objection to the use of the words though perhaps unnecessary.

If mental suffering can be properly considered in assessing damages in such actions as assault, defamation, malicious prosecution, seduction etc., as it properly can, there seems no good reason why it should not be so considered in such a case of misconduct as this is alleged to be when it is a natural and certain consequence of the defendants' acts.

Mr. Lane has shown great industry in searching for authority but the only Canadian case in point which he has found is the decision of a single Judge in Quebec, Davidson, J., (afterwards C.J.) in *Philipps v. Montreal General Hospital* (1908), 33 Que. S.C. 483. The case was exactly like this except that the plaintiff was the widow. Her action was against the defendant for damages for holding an autopsy against her will. It was held that the allegations disclosed a cause of action.

A case in the Supreme Court of Minnesota, exactly in point, is also cited *Larson v. Chase*, 14 L.R.A. 85, the headnote of which is:—"The right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin This right is one which the law recognizes and will protect, and for any infraction of it,—such as an unlawful mutilation of the remains,—an action for damages will lie. In such an action a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proved."

While the case is an American one, its reasoning is based on the principles of the English common law and in my opinion is entirely applicable to the present case and the conclusion is, I think, warranted under the authorities and principles above mentioned.

I would, therefore, allow the appeal with costs under col. 4 and dismiss the application below with costs to the plaintiff in the cause in any event.

Appeal allowed.

See: Williams v. Williams (1882), 20 Ch.D. 659 (H.C.); Meeks v. State 185 N.E. 899 (1933, Supreme Court of Indiana); Hickey v. Hickey 298 N.E. 2d 29 (1973, Court of Appeals of Indiana).

And see: The Anatomy Act, R.S.O. 1970, c. 21; The Coroners Act, S.O. 1972, c. 98 as amended by S.O. 1974, c. 103.

See also: Skegg, Human Corpses, Medical Specimens and the Law of Property, (1975), 4 Anglo-American Law Review, 412.

For a discussion on the topic of whether there exist property rights in human limbs or other body materials, see Dickens, The Control of Living Body Materials (1977), 27 U. of T.L.J. 142. The author makes the following statements on pp. 180-183 (footnotes omitted).

A philosophical approach to the origination from a living body of independently tangible material or of fluids capable of isolation may be to consider them *res nullius*, that is, corporeal items in the legal ownership of nobody. They might be reduced into possession by the first person to obtain physical control who intends to exercise control over them, in accordance with the tests of classical jurisprudence.²⁰⁶ This prescription of possession from which ownership may be inferred would by definition afford the human source no prior interest. In a sophisticated legal system where personal property rights are highly developed, the list of items constituting *res nullius* is short.²⁰⁷ The concepts of property and ownership have tended to be pragmatic, evolving in response to the economic or spiritual recognition of objects as having value; ²⁰⁸ 'property' described a valuable right or interest in a thing, moreover, rather than the thing itself. In pre-history, for instance, when humans could survive only where land, natural crops, wild animals, and game were available without the application of systematic labour to agriculture and hunting or trapping, they had no value, and were not considered ownable. Use may expose scarcity, however, scarcity begets value, and value is concretized in property.²⁰⁹ Value is both material (or economic) and superstitious (including sentimental and spiritual), but it is only in recent times that separated body materials have become capable of a use that gives them value, whether for sale or for philanthropic dedication. Even in the case of cadavers, their employment in medical education occurred on a significant scale only when medicine evolved the conceit of being scientific, which happened after the common law had largely exhausted its capacity for free growth, so that creative legal use of cadavers required the formulation of legislation, namely anatomy acts.²¹⁰

No theoretical limit can be set to how far the law may go in recognizing new property interests. Materials as abstract as gas can be possessed and stolen,²¹¹ as may electricity,²¹² and vibration has been treated as an 'object' in trespass and possibly nuisance law.²¹³ In 1940 it was observed that 'Atmospheric or ethereal vibrations, in the form of radiated waves, have become one of the most important forces in the world, and at any moment a legal question may arise whether they are capable of property or possession.'²¹⁴ While 'Knowledge or ideas, as such, do not constitute property,'²¹⁵ the mode of expression of an idea can attract copyright protection. Thus, a person's interest in producing the electrochemical activity that can be monitored in

his brain may in the future be analysed in terms of property, rather than of privacy, and as, for instance, a meditative or creative technique, may become comparable to intellectual, literary, and industrial property.

The characterization of separated body materials as *res nullius* may serve the interests of neither the human source nor others. To suggest that material immediately passes into the absolute ownership of the hospital or physician undertaking or supervising its removal and intending to appropriate it might defeat the source's justifiable interest in its use or disposition and the purpose of its specific donation, for instance for diagnosis, transplantation, or a particular research project. It may be inadequate regarding even body waste, of which a person will normally relieve himself as speedily and conveniently as possible compatibly with social delicacy, expecting and hoping never to hear of it again. Sanitary regulations and the general law on nuisance require one in charge of premises or land on which such waste is discharged adequately to dispose of it,²¹⁶ and his claim that it is *res nullius* and that he has not reduced it into his possession will carry little weight; liability attaches, however, as an incident of land tenure rather than of control of the materials *per se*. Recently revealed instances reinforce the legal inadequacy to the human source of recognizing effective control of his body waste in another person whose use of it he is powerless to regulate. Under the guise of conducting kidney-function tests, researchers collected urine from young psychiatric patients for the undisclosed purpose of testing it for secret drug abuse.²¹⁷ It was later claimed that the incident 'did not materially affect the patients in any adverse way,' and had potentially aided their treatment,²¹⁸ but the practice might create records liable to subpoena for a prosecution, and to inspection at the discretion of the treating facility.

...

Recognizing waste materials as *res nullius*, capable of exclusive legal control by the person first possessing them, clearly will not serve the interests of the human source. Similarly, recognition as *res nullius* of material such as a limb or digit severed from the human source in an accident or an assault may be inconsistent with his interest in its preservation for prompt surgical rejoining to his body. His claim to it should not be impaired by the chance of **the item falling upon another's land or being retrieved and retained by a stranger not implicated in causing the loss.** A better approach, therefore, may be to consider the human source as having an inchoate right of property in materials issuing from his body, which right he may expressly or by implication abandon to another,²²⁵ or similarly make prevail over a contending claim.

This may well accord to the sentimental reaction to the origination of body material in its separate state. The right is better considered inchoate than fully constituted, since the material may never in fact come under the source's notional or physical control. He may be unconscious, for instance, when it is separated, and it may be deemed abandoned, perhaps to a hospital, very soon after it is first isolated. Traditional jurisprudential tests of, for instance, intention, possession, and control as affecting ownership may more easily be preserved by considering the initial interest of the source *prima facie* a superior right to that of any other person,²²⁶ but a right only in prospect.

Problems:

In June, 1976, John's arm was badly injured in an industrial accident. John was rushed to hospital. The doctors advised John that his arm should be amputated. John consented to this operation. Upon John's discharge from hospital he requested the delivery of this arm. The hospital authorities refused to return to John the amputated arm saying that they wished to retain it for purposes of medical research. Advise John.

In July, 1978, Janet underwent an abortion in a downtown Toronto hospital. After a short period of recovery, Janet told her physician that she wished to take possession of the fetus. The physician refused and informed Janet, that the fetus would be used for medical research. Advise Janet.

See: Browning v. Norton-Children's Hospital 504 S.W. 2d 713 (1974, Court of Appeals of Kentucky); Brooks v. South Broward Hospital District 325 So. 2d 479 (1975, District Court of Appeal of Florida); Venner v. State 354 A. 2d 483 (1976, Court of Special Appeals of Maryland).